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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M/V COSCO BUSAN, LR/IMO Ship. No.
9231743 her engines, apparel, electronics,
tackle, boats, appurtenances, etc., *in rem*,
THE SHIPOWNERS' INSURANCE &
GUARANTY COMPANY LTD., REGAL
STONE, LIMITED, FLEET
MANAGEMENT LTD., and JOHN COTA,
in personam,

Defendants.

Case No. C 07 06045 (SC)

**DEFENDANTS REGAL STONE LTD.
AND FLEET MANAGEMENT, LTD.'S
NOTICE OF MOTION AND MOTION
TO DISMISS, OR IN THE
ALTERNATIVE, STAY
PROCEEDINGS
[FRCP 12(b)(1)]**

**Date: April 25, 2008
Time: 10:00 a.m.
Dept.: 1
(The Honorable Samuel
Conti)**

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TO ALL PARTIES TO THIS ACTION AND THEIR ATTORNEY(S) OF RECORD:

NOTICE IS HEREBY GIVEN that on April 25, 2008 at 10:00 a.m. in Courtroom 1 of the above-entitled Court, the Honorable Samuel Conti presiding, Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD. ("Defendants") will move to dismiss, or in the alternative to stay, proceedings pursuant to the Federal Rules of Civil Procedure, Rule 12(b) 1, on all causes of action against Defendants contained in Plaintiff UNITED STATES OF AMERICA's ("Plaintiff") Complaint on file herein.

This Motion will be based upon this Notice of Motion and Motion to Dismiss and Stay Proceedings, the accompanying Memorandum of Points and Authorities, the Declarations of Cynthia Hudson, K. Tim Perkins and Joseph A. Walsh II and all Exhibits attached thereto, the complete files and records of this action, and such other oral and documentary evidence as may be introduced at the hearing of this matter.

I. INTRODUCTION

Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD. ("Defendants") move to dismiss the United States' claims for removal costs and damages, on the grounds that the Court lacks subject matter jurisdiction. The Court lacks subject matter jurisdiction because the United States has ignored the Oil Pollution Act's ("OPA") mandatory claims presentation requirement. OPA requires the United States to submit detailed invoices for its removal costs and damages, and to allow Defendants 90 days to pay those invoices, before filing suit. Until the United States complies with these provisions, the Court lacks jurisdiction to hear its claims for removal costs and damages.

Counts One and Five of the complaint seek recovery of the United States' removal costs and damages under the National Marine Sanctuaries Act ("NMSA") and the Park System Resource and Protection Act ("PSRPA"). However, the damages recoverable under those statutes are identical to those recoverable under OPA. Trustee agencies of the United States and the State of California have begun a multi-year, natural resource damage assessment ("NRDA") process that includes an assessment of injuries to resources within marine sanctuaries and parks resulting from the Cosco Busan incident.

1 They will be seeking compensation for any such injuries under OPA, once the NRDA
2 process is complete. Because the United States is seeking recovery for damages to
3 marine sanctuaries and national parks under the PSRPA, the NMSA, and OPA, OPA's
4 claims presentation requirement applies to these claims.

5 Defendants also move to dismiss the United States' claim seeking a declaration
6 that Defendants are liable for all removal costs and damages, because Defendants have
7 already acknowledged they are strictly liable to pay for removal costs and damages
8 resulting from the COSCO BUSAN incident. Given this situation, there is no case or
9 controversy for the court to address.

10 The United States has advised that it will ask the Court to rule on whether
11 Defendants are entitled to partial reimbursement of some of their OPA liabilities from
12 the Oil Spill Liability Trust Fund (OSLTF). OPA allows a ship owner to seek such
13 reimbursement from the OSLTF in some cases. If the Court ruled in Defendants favor
14 on this issue, it would obligate the OSLTF to pay Defendants tens of millions of dollars.
15 However, the issue is not within the Court's subject matter jurisdiction. OPA does not
16 waive the sovereign immunity of the United States, or confer jurisdiction on this Court
17 to rule on whether Defendants are eligible for partial reimbursement from the OSLTF.
18 Instead, OPA provides that such claims for reimbursement should be submitted to the
19 National Pollution Funds Center ("NPFC"), a division of the Coast Guard that
20 administers the OSLTF. The doctrines of sovereign immunity, exhaustion of
21 administrative remedies, and primary jurisdiction all require the court to dismiss any
22 claims relating to this issue.

23 24 **II. APPLICABLE LAW GOVERNING MOTIONS TO DISMISS FOR LACK OF** 25 **JURISDICTION.**

26 On a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of
27 establishing that jurisdiction exists. Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d
28 1007, 1019 (9th Cir. 2002). Unless a plaintiff can prove otherwise, a federal court must

1 presume an action lies outside of its jurisdiction. See, Kokkonen v. Guardian Life Ins.
 2 Co., 511 U.S. 375, 377 (1994); see also, Stock West, Inc. v. Confederated Tribes of the
 3 Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989). “A plaintiff suing in federal
 4 court must show in his pleading, affirmatively and distinctly, the existence of whatever
 5 is essential to federal jurisdiction, and, if he does not do so, the court, on having the
 6 defect called to its attention or on discovering the same, must dismiss the case, unless
 7 the defect be corrected by amendment.” Smith v. McCullough, 270 U.S. 456, 459 (1926);
 8 Tosco Corp. v. Communities for a Better Env’t, 236 F.3d 495, 499 (9th Cir. 2001).

9 A party moving to dismiss for lack of subject matter jurisdiction may submit
 10 “affidavits or any other evidence properly before the court. * * * It then becomes
 11 necessary for the party opposing the motion to present affidavits or any other evidence
 12 necessary to satisfy its burden of establishing that the court, in fact, possesses subject
 13 matter jurisdiction.” Assoc. of Am. Med. Colleges v. United States, 217 F. 3d 770, 778
 14 (9th Cir. 2000); Safe Air for Everyone v. Meyer, 373 F. 3d 1035, 1038 (9th Cir. 2004).

16 **III. RELEVANT FACTS**

17 On November 7, 2007, the COSCO BUSAN discharged approximately 53,000
 18 gallons of bunker fuel into San Francisco Bay. (Declaration of K. Tim Perkins (“Perkins
 19 Decl.”).) Defendants immediately took responsibility for the oil spill cleanup and
 20 accepted liability for settling claims for damages resulting from the oil spill. (Id.) They
 21 have paid in excess of \$40 million to date in clean up costs, and have cooperated and
 22 participated within the Unified Command System to respond to the spill. (Id.) They
 23 continue to pay the costs for the clean up of the oil and are now participating in a
 24 cooperative assessment of damage to natural resources resulting from the spill. (Perkins
 25 Decl.; Declaration of Cynthia Hudson (“Hudson Decl.”); Declaration of Gary Mauseth
 26 (“Mauseth Decl.”).)

27 On November 8, 2007, the California Department of Fish and Game Office of Spill
 28 Prevention and Response designated Regal Stone Limited as the Responsible Party

1 pursuant to California Government Code section 8670.51.1(a)(1). (Perkins Decl., Exhibit
2 A.) On November 9, 2007, the United States Coast Guard issued a similar designation
3 and notice pursuant to the OPA. (Id.) Both notices required the Responsible Party to
4 widely advertise the manner in which claims arising from the incident would be
5 accepted and paid. (Id.)

6 Defendants have not contested these notices of designation. (Perkins Decl., ¶ 5.)
7 On November 10, 2007, Hudson Marine Management Services ("HMMS") set up a claims
8 center and widely advertised the claims handling process with advertisements in local
9 media, the internet, and by posting fliers at relevant marinas and other locations.
10 (Hudson Decl., ¶ 4.) Thereafter, HMMS began processing and paying claims. (Id.) The
11 normal practice following a spill is for the United States to issue invoices to the
12 Responsible Party for its response costs. (Perkins Decl., ¶ 7; Hudson Decl., ¶ 6.) The
13 responsible party then reimburses the United States for its costs. (Id.) To date, only five
14 claims have been received from the United States. (Hudson Decl., ¶ 6.) Three have been
15 settled and two are pending. (Id.) The pending claims are less than 90 days old. (Id.)

16 On November 30, the United States filed this action. It filed the action because it
17 claimed it needed security for its claims against the COSCO BUSAN. However, it is not
18 necessary to institute a lawsuit to obtain such security, and it is standard practice for
19 insurers of vessels such as the COSCO BUSAN to issue security when it is requested,
20 without first requiring that a lawsuit be filed. (Federal Rules of Civil Procedure,
21 Supplemental Rule E; Declaration of Joseph A. Walsh ("Walsh Decl.") ¶ 2.) The insurer
22 for the Defendants in this case provided the United States security for its claims in the
23 amount of \$79,500,000.00. (Walsh Decl., Exhibit A.)

24 Agencies of the United States and the State of California, with jurisdiction over
25 the natural resources impacted by the COSCO BUSAN oil spill ("Trustee Agencies"),
26 have commenced a cooperative natural resource damages assessment ("NRDA") process,
27 pursuant to the OPA NRDA regulations, set forth at 15 C.F.R. § 990, and State law.
28 (Walsh Decl., ¶ 5.) The NRDA regulations require the Trustee Agencies to follow a

1 detailed assessment process, and to seek public comment and input, before settling any
 2 claims for natural resource damages. (*Id.*) If the Trustee Agencies follow the NRDA
 3 regulations, they are entitled to a rebuttable presumption under OPA that their
 4 determinations of damages to natural resources are correct. 33 U.S.C. § 2706(e)(2). The
 5 NRDA process normally takes several years to complete. (Mauseth Decl., ¶ 6.) Among
 6 the injuries that the trustees are assessing are injuries to resources under the
 7 jurisdiction of national parks and national marine sanctuaries. (*Id.*; Walsh Decl.)

9 IV. OIL POLLUTION ACT OF 1990

10 In 1990 following the EXXON VALDEZ oil spill, Congress overhauled the nation's
 11 oil pollution laws by enacting OPA. Prior to the enactment of OPA, a vessel owner's
 12 liability to the United States for oil pollution was governed by the Federal Water
 13 Pollution Control Act ("FWPCA"), 33 U.S.C. 1321. In hearings leading to the enactment
 14 of OPA, Congress expressed dissatisfaction with the FWPCA. Its criticisms included the
 15 fact that the FWPCA only addressed a vessel owner's liability to the United States, and
 16 that it limited that liability to \$150 per gross ton of the vessel discharging the oil. This
 17 limit was viewed as too low. See Oil Spill Liability and Compensation: Hearing Before
 18 the Subcomm. On Water Resources of the Comm. On Public Works and Transp., H. of
 19 Rep., 101st Cong. 78 (1989) ("[L]iability under the FWPCA is low (\$150/ton) and the
 20 scope of damages to which liability pertains is limited to the Federal Government's
 21 cleanup costs and natural resource damages.").

22 Complicating matters, a vessel owner could not assert a credit against the
 23 \$150/ton limitation amount for funds it expended in cleaning up the spill. United States
 24 v. Dixie Carriers, 736 F.2d 180, 183 (5th Cir. 1980); Steuart Trans. Co. v. Allied Towing
 25 Corp., 596 F.2d 609, 619 (4th Cir. 1979). Courts also held that the FWPCA pre-empted
 26 other causes of action by the United States against a vessel owner to recover removal
 27 costs incurred to clean up an oil spill. Matter of Oswego Barge Corp., 664 F.2d 327, 344
 28 (2d Cir. 1981); United States v. M/V BIG SAM, 681 F.2d 432 (5th Cir. 1982). Thus, the

1 United States could only recover its response costs from a discharging vessel up to the
2 FWPCA limits on its liability, and the owner was not entitled to a credit against its
3 FWPCA liability for any costs it expended to clean up a spill. The FWPCA thus created
4 a financial disincentive for vessel owners to spend money to clean up oil spills. See
5 Dixie Carriers, 736 F.2d at 183-185.

6 Congress was also dissatisfied with the settlement of private party claims
7 following oil spills. It heard testimony that individuals were often forced to litigate their
8 claims in court for years in order to recover their losses. Congress insisted that those
9 injured by spills should be swiftly compensated for their losses: “We do not want
10 claimants to have to wait years upon years to recover their losses while lawsuits drag on
11 in the courts. Instead, if they are unable to reach a settlement with the spiller within 90
12 days, they can be compensated from the oil industry financed by the fund, and the fund
13 will go after the spiller for reimbursement.” 135 Cong. Rec. H7954-H7978 (daily ed.
14 Nov. 2, 1989); “The thrust of this legislation is to eliminate, to the extent possible, the
15 need for an injured person to seek recourse through the litigation process, which—as we
16 all know—can take years.” 135 Cong. Rec. H7954-H7978 (daily ed. Nov. 2, 1989).

17 In OPA, Congress remedied these deficiencies. It made clear that a vessel owner
18 is strictly liable for all clean up costs and damages resulting from a discharge of oil from
19 its vessel. 33 U.S.C. §2702. It required the President to designate the owner of a
20 discharging vessel as the “Responsible Party” and required the Responsible Party to
21 publish a notice advising claimants of this designation, and procedures by which they
22 may submit claims for reimbursement. 33 U.S.C. § 2714. To avoid delays in the
23 payment of claims, it made the Responsible Party liable to pay interest after 30 days
24 from the date on which a claim is received, and to establish procedures for interim,
25 partial payments to claimants. 33 U.S.C. §§ 2705, 2714(b)(2).

26 To discourage litigation over claims in court, Congress provided that a claimant
27 must first present a claim for removal costs or damages to the Responsible Party,
28 following the procedures identified in the notice published pursuant to 33 U.S.C. § 2714.

1 See 33 U.S.C. § 2713(a) & (c). If, after 90 days, the Responsible Party does not settle
2 with a claimant, the claimant may sue the Responsible Party, or may submit its claim to
3 the National Pollution Funds Center (NPFC), established under OPA to administer the
4 Oil Spill Liability Trust Fund (“Fund”). Id. OPA provides that the Fund may be used to
5 settle such claims. 33 U.S.C. § 2712(a)(4). If the Fund does so, it becomes subrogated to
6 the rights of the claimant, and may seek recovery of amounts paid from the Responsible
7 Party. 33 U.S.C. §§ 2712(f), 2715.

8 As with most comprehensive statutes, OPA is the “result of innumerable
9 compromises between competing interests, reflecting many competing purposes and
10 goals.” Boca Ciega Hotel Inc. v. Bouchard Trans. Co., Inc., 51 F.3d 235, 238 (11th Cir.
11 1995). Thus, while OPA substantially increased the liability of vessel owners, it also
12 preserved the right of a vessel owner to limit its liability in some cases. 33 U.S.C.
13 § 2704. To eliminate the financial disincentive for a vessel owner to respond to an oil
14 spill that had existed under the FWPCA, Congress provided that the right to limit
15 liability, or to assert a complete defense to liability, is lost if the Responsible Party fails
16 to provide all reasonable cooperation and assistance requested by a responsible official,
17 or to comply with a Coast Guard cleanup order. 33 U.S.C. §§ 2703(c) & 2704(c). Even a
18 party that is entitled to a complete defense under OPA remains responsible for
19 responding to a spill and cleaning it up. Unocal Corp. v. U.S., 222 F.3d 528, 534-36 (9th
20 Cir. 2000).

21 Thus, even though a Responsible Party may have a complete defense to liability,
22 or the right to limit its liability, OPA provides that the Responsible Party must respond
23 to the spill and clean it up, if the federal or state governments request it to do so – even
24 if the cost of doing so exceeds the limits on the Responsible Party’s liability under OPA.
25 Because it is rarely clear in the days after a spill whether the Responsible Party has a
26 defense to OPA liability, or the right to limit that liability, the Coast Guard, as a matter
27 of practice, always designates the vessel owner and/or operator from which a discharge
28 occurs as the Responsible Party, and directs the Responsible Party to respond and clean

1 up the spill. If a Responsible Party believes it is entitled to a complete defense to
2 liability, or that it has the right to limit its liability under OPA, OPA allows the
3 Responsible Party to submit a claim to the NPFC for reimbursement of amounts it has
4 paid that exceed its liability. 33 U.S.C. §§ 2708, 2713(b)(1)(B).

5 These provisions create a powerful incentive for vessel owners and their insurers
6 to respond to spills and to clean them up to the satisfaction of state and federal officials.
7 Unlike the FWPCA, under OPA a vessel owner who refuses a request that it clean up oil
8 spilled from its vessel runs the risk that the NPFC will deny its claim for reimbursement
9 on the grounds that it failed to provide cooperation and assistance requested by the
10 Coast Guard or the State.

11 While OPA allows a vessel owner to seek reimbursement of removal costs and
12 damages it pays in excess of the limits on its liability from the Fund by presenting an
13 administrative claim to the NPFC, it does not allow the vessel owner to sue the United
14 States for reimbursement of those costs in court. 33 U.S.C. section 2708 is the only
15 provision of OPA that permits a Responsible Party to obtain reimbursement of such
16 costs, and it only allows the Responsible Party to do so by filing an administrative claim
17 with the NPFC under 33 U.S.C. § 2713.

18 The NPFC is an administrative agency within the United States Coast Guard. See
19 <http://www.USCG.mil/npfc>. Located in Arlington Virginia, the NPFC maintains a
20 claims division which processes claims brought pursuant to 33 U.S.C. § 2713 by federal
21 and state agencies, private individuals, and responsible parties. NPFC regulations
22 governing OPA claims are published at 33 C.F.R. part 136. The NPFC also publishes
23 claims guidelines for claimants, including a "Responsible Party Claim Submission
24 Guidance" for ship owners seeking reimbursement from the OSLTF.

25 See http://www.USCG.mil/npfc/docs/PDFs/urg/URG_7_05.pdf. A claimant may seek
26 reconsideration from a denial of a claim by the NPFC. 33 C.F.R. § 136.115(d). If the
27 agency denies such a request, the denial will be deemed a final agency action, of which a
28

1 claimant may seek review under the Administrative Procedures Act ("APA"), 5 U.S.C.
2 §§ 701, *et seq.* .

3
4 **V. THE UNITED STATES CLAIMS FOR REMOVAL COSTS AND DAMAGES**
5 **MUST BE DISMISSED UNTIL THE UNITED STATES COMPLIES WITH**
6 **OPA'S CLAIMS PRESENTATION REQUIREMENTS.**

7 **A. The Presentation Requirement of the Oil Pollution Act of 1990**
8 **Requires Dismissal of All Claims For Removal Costs or Damages**

9 OPA requires that "all claims for removal costs or damages shall be presented
10 *first* to the Responsible Party." 33 U.S.C. § 2713(a)(emphasis added). A claim must be
11 specific. It must "inform the responsible party with some precision of the nature and
12 extent of the damages alleged and the amount of monetary damages claimed.
13 Otherwise, the responsible party will be unable to make an informed offer of its own,
14 unable to engage in meaningful settlement negotiations, and thus unable to settle the
15 matter by agreeing to a final amount." Johnson v. Colonial Pipeline Co., 830 F. Supp.
16 309, 311 (E.D. Va 1993). The NPFC regulations set forth the specificity requirements for
17 a claim for response costs and damages. *Id.* A party may not sue the responsible party
18 in court, unless the responsible party denies the claim or fails to respond within 90 days.
19 33 U.S.C. § 2713(c). As explained in Johnson, Congress hoped that this claims process
20 would avoid the need for litigation:

21 The purpose of the claim presentation procedure is to promote
22 settlement and avoid litigation. Congress believed that
23 lawsuits against parties are appropriate only 'where attempts
24 to reach a settlement with the Responsible Party . . . were
25 unsuccessful.' H.R. Rep. No. 242, 101st Cong., 1st Sess., pt. 2, at
26 66 (1989). The hope was to avoid costly and cumbersome
27 litigation.

28 Johnson, 830 F.Supp at 311; *see also*, Boca Ciega, 51 F.3d at 238-234 ("OPA reflects
Congress' desire to encourage settlement and avoid litigation.") The presentation
requirement is jurisdictional and mandates dismissal when it is not complied with. Boca
Ciega, 51 F.3d 235, 238-240 (11th Cir. 1995); Johnson v. Colonial Pipeline Co., 830

1 F.Supp. at 309-10; Marathon Pipeline Co. v. LaRoche Industries, 944 F.Supp 476, 477
 2 (E.D. La 1996).

3 In this case, the United States has presented five small claims to Defendants.
 4 (Hudson Decl., ¶ 6.) Three have been settled and two are pending. (Id.) None are older
 5 than 90 days. (Id.) The United States filed this action 23 days after the Cosco Busan
 6 incident in blatant disregard of OPA's mandatory claims presentation requirements.
 7 Thus its claims for removal costs and damages resulting from the COSCO BUSAN
 8 incident must be dismissed.

9 **B. The Presentation Requirement Applies to Claims for Removal**
 10 **Costs and Damages Under the NMSA and the PSRPA**

11 OPA expressly requires that "all claims for removal costs and damages shall first
 12 be presented to the responsible party." 33 U.S.C. § 2713(a) (emphasis added). A
 13 claimant may only sue the responsible party if the responsible party denies the claim or
 14 fails to respond to it within 90 days. 33 U.S.C. § 2713(c).

15 OPA defines a "claim" as "a request, made in writing for a sum certain, for
 16 compensation for damages or removal costs resulting from an incident." 33 U.S.C. §
 17 2701(3). "Incident" means "any occurrence . . . resulting in the discharge ...of oil." 33
 18 U.S.C. § 2701(14). The United States has determined that the COSCO BUSAN spill was
 19 an incident under OPA, as reflected in its Notice of Designation. (Perkins Decl., Exhibit
 20 "A.") Thus OPA's claims presentation requirement clearly applies to "all claims" for
 21 "removal costs" and "damages" that result from the COSCO BUSAN incident.

22 "Removal costs" are broadly defined in OPA to include the cost of:

23 containment and removal of oil ...from water and shorelines,
 24 or the taking of other actions as may be necessary to minimize
 25 or mitigate damage to public health or welfare, including, but
 26 not limited to, fish, shellfish, wildlife, and public and private
 property, shorelines, and beaches.

27 33 U.S.C. § 2701(30) & (31). OPA makes Defendants strictly liable for "all" of the United
 28 States removal costs resulting from the Cosco Busan incident. 33 U.S.C. § 2702(a) &

1 (b)(1). "Damages" under OPA include damages for injury to, destruction of, loss of, or
2 loss of use of, natural resources, including the reasonable costs of assessing the damage,
3 and damages for injury to real or personal property, economic losses resulting from
4 destruction of, real or personal property, lost revenues such as taxes, and increased costs
5 of providing public services during or after removal activities. 33 U.S.C. § 2702(b)(2).

6 With these terms defined, there are no conceivable claims for removal costs or
7 damages resulting from the Cosco Busan incident that the United States can recover
8 under the NMSA or the PSRPA, that are not also recoverable under OPA. The PSRPA
9 defines "damages" to include the cost of replacing or restoring damaged resources, the
10 loss of use of those resources, and the costs of assessing such damages. 16 U.S.C.
11 § 19jj(b). It defines Response Costs to include the costs of actions taken by the United
12 States to prevent, minimize, or abate the destruction or loss of a park resource. 16
13 U.S.C. § 19jj(c). The NMSA also allows the United States to recover civil damages for
14 the destruction of, or loss of use of, marine sanctuary resources. 16 U.S.C. § 1443. These
15 definitions do not allow the United States to recover, under the NMSA or the PSRPA,
16 any response costs or damages, as a result of the oiling of park or marine sanctuary
17 resources, which are not otherwise recoverable under OPA.

18 Since all of the claims asserted by the United States are for damages or response
19 costs resulting from the Cosco Busan incident, they are subject to OPA's claims
20 presentation requirement. As set out above, Congress intended that OPA would
21 minimize litigation following an oil spill by creating a mandatory non-judicial claims
22 presentation requirement. Congress' use of the words "all claims" in 33 U.S.C. § 2713 (a)
23 and its broad definitions of "claim", "removal costs," and "damages" reflect its clear
24 intent to require that claims such as those pursued by the United States in this lawsuit
25 be presented to the responsible party for settlement before a lawsuit is filed. Nothing in
26 OPA suggests that Congress intended to permit claimants, including the government, to
27 avoid the mandatory claims process by suing for OPA removal costs or damages under
28 non-OPA causes of action.

OPA's savings provision does not affect or modify the claims presentation requirement. The provision simply states that OPA should not be construed to affect the authority of the United States or a State to impose *additional* liability or *additional* requirements relating to a discharge of oil. 33 U.S.C. § 2718(c). This provision preserves the rights of States and Congress to enact laws in addition to OPA that impose additional liabilities on polluters. After complying with OPA's claims presentation requirements, nothing prevents the United States from suing Defendants under non-OPA causes of action. Thus, OPA's savings provision does not allow a claimant to disregard the mandatory claims presentation requirement under OPA for removal costs or damages that result from an incident. Boca Ciega, 51 F.3d at 239.

C. In the Alternative, the Court Should Stay the Case with Respect to the Non-OPA Causes of Action

If the Court determines that OPA's presentation requirements do not apply to the non-OPA causes of action, then Defendants request that the Court stay any proceedings with respect to these claims. The Court has the inherent power to stay proceedings before it in the interest of judicial economy. Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (Power to stay is "incidental to the power inherent in every court to control the disposition if the causes of action on its docket.") Staying proceedings is appropriate when the interests of justice require it, the adjudication of a claim would be a waste of judicial resources, and the plaintiff will not be substantially harmed by the stay. See Hess v. Gray, 85 F.R.D. 15, 27 (N.D. Ill 1979).

These principles favor granting a stay of the United States' causes of action brought against Defendants under the NMSA and the PSRPA. The damages being sought by the United States under the NMSA and the PSRPA are the same damages that the United States will seek to recover under OPA. Only a very small part of the United States response costs will be for response activities in marine sanctuaries or national parks. The damages for injury to natural resource within sanctuaries and parks are being pursued by the NRDA trustees, under the OPA NRDA regulations.

Defendants have advanced the U.S. Dept. of the Interior \$500,000 to date to conduct this assessment. (Walsh Decl., ¶¶ 5-6.)

Because OPA prohibits a double recovery for injuries to natural resources, 33 U.S.C. 2706(d)(3), the United States cannot pursue a claim for injury for these resources under both OPA and non-OPA causes of action. Conversely, permitting the United States to pursue its claims under the NMSA and the PSRPA will prejudice the Defendants. Such a result will force the Defendants to expend time and resources litigating their liability under three statutes when the pertinent issues can be resolved under a single statute- OPA '90. Finally, a stay will save judicial resources. There is no reason for the Court to judicially oversee claims that would otherwise resolve through the OPA claims adjudication process.

VI. THE UNITED STATES' FORFEITURE ACTION UNDER THE NMSA MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ALLEGE THE DEFENDANTS HAVE TAKEN OR RETAINED SANCTUARY RESOURCES.

Courts must strictly construe forfeiture statutes against the government. United States v. One 1992 Ford Mustang, 73 F. Supp. 2d 1131, 1131 (C.D. Cal. 1999)("Forfeiture is a harsh and oppressive procedure which is not favored by the courts."); see also United States v. \$191,910.00 in U.S. Currency, 16 F. 3d 1051, 1069 (9th Cir. 1994) (overruled on other grounds). Therefore, this Court must strictly construe the NMSA's forfeiture section. In construing the NMSA's forfeiture section, the starting point is the statute's language. United States v. One Parcel of Land In The Name of Mikell, 33 F. 3d 11, 13 (5th Cir. 1994). If a statute's language makes Congress' intent clear, "that is the end of the matter." Id.

The NMSA provides:

Any vessel (including the vessel's equipment, stores, and cargo) and other item used, *and any sanctuary resource taken or retained*, in any manner, in connection with or as a result of any violation of this chapter or of any regulation or permit issued under this chapter shall be subject to forfeiture to the

1 United States pursuant to a civil proceeding under this
 2 subsection...

3
 4 16 U.S.C. § 1437(d)(1)(emphasis added). The foregoing emphasized language
 5 demonstrates Congress' intent to permit vessel forfeiture under the NMSA only when a
 6 vessel is used to take or retain a sanctuary resource.¹ This Court must strictly construe
 7 the statute to this effect. If Congress intended the NMSA to permit vessel forfeiture for a
 8 violation of the NMSA that did *not* involve the taking or retention of a sanctuary
 9 resource, it would have used "or" instead of the above-emphasized "and." However,
 10 Congress did not do so. This Court must presume that "Congress chose its words with as
 11 much care as [the Court] brings to bear on the task of statutory interpretation." United
 12 States v. BCCI Holdings (Luxembourg), S.A., 833 F. Supp. 17, 21 (D.D.C. 1993)(citation
 13 omitted). Consequently, the United States must allege sanctuary resources were taken
 14 or retained in connection with or as a result of the COSCO BUSAN incident. The United
 15 States fails to allege this essential element. Therefore, the Defendants respectfully
 16 request that this Court dismiss the United States' NMSA forfeiture action.

17 Additional provisions of the NMSA's forfeiture section demonstrate that Congress
 18 contemplated vessel forfeiture only upon the taking or retention of a sanctuary resource.
 19 Critically, the NMSA provides that for vessel forfeiture purposes, "there is a rebuttable
 20 presumption that *all sanctuary resources found on board* a vessel that is used...in
 21 connection with a violation of this chapter...were taken or retained in violation of this
 22 chapter..." 16 U.S.C. § 1437(d)(4)(emphasis added); see also 16 U.S.C. §
 23 1437(d)(3)(disposal of sanctuary resources seized in connection with a vessel forfeiture).
 24 Taken together with 16 U.S.C. § 1437(d)(1), these additional provisions establish an
 25 enforcement regime for addressing instances where sanctuary resources are taken or

26
 27 ¹ "Sanctuary resource" means any living or nonliving resource of a national marine
 28 sanctuary that contributes to the conservation, recreational, ecological, historical,
 research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

1 retained from designated marine sanctuaries. The United States complaint does not
2 implicate this regime because it does not allege such conduct resulted from the COSCO
3 BUSAN incident or that the COSCO BUSAN was used to perpetrate such conduct.
4 Therefore, this Court should dismiss the United States' forfeiture action.

5
6 Finally, although the NMSA does not define what conduct results in the taking or
7 retention of a sanctuary resource, the NMSA's language demonstrates that Congress
8 intended such conduct to be something more than conduct resulting only in the
9 destruction, loss, or injury to sanctuary resources. While such conduct alone supports
10 other forms of relief, e.g., civil penalties (see 16 U.S.C. §§ 1437(c)(1) & 1436(1)), *in rem*
11 liability (16 U.S.C. § 1443(2)) and injunctive relief (16 U.S.C. § 1437(i), the NMSA's
12 forfeiture section requires such conduct to occur *in connection* with or *result in* a
13 sanctuary resource being taken or retained. See 16 U.S.C. §§ 1437(d)(1) & 1436(1). In
14 other words, Congress intended conduct causing damage to, the loss of, or injury to a
15 sanctuary resource to permit vessel forfeiture only if such conduct occurred in connection
16 with or resulted in a *separate and distinct* event constituting the taking or retention of a
17 sanctuary resource. Accordingly, the United States' allegation that "vessels used to
18 destroy and/or cause the loss and/or injure National Marine Sanctuaries...are subject to
19 forfeiture..." is insufficient to support its forfeiture action. See Complaint ¶ 34. The
20 Defendants respectfully request that this Court dismiss the United States' NMSA
21 forfeiture action.

22 **VII. THERE IS NO ACTUAL CONTROVERSY UNDER THE DECLARATORY** 23 **JUDGMENT ACT**

24 Plaintiff's fourth cause of action requests a declaratory judgment that Defendants
25 are liable for removal costs and damages resulting from the oil spill. However, since
26 Defendants admit they are strictly liable to pay OPA response costs and damages, there
27 is no case or controversy for the Court to address. Once again, Defendants reiterate that
28 they accepted the notice of designation months ago as the Responsible Party and have

1 been funding the response and paying legitimate claims for damages resulting from the
2 oil spill.

3 The Declaratory Judgment Act authorizes federal courts to declare the rights and
4 other legal relations of parties when an actual controversy exists. 28 U.S.C. § 2201. The
5 Act provides that “in a case of actual controversy within its jurisdiction . . . any court of
6 the United States . . . may declare the rights and other legal relations of any interested
7 party seeking such declaration, whether or not further relief is or could be sought.”

8 28 U.S.C. § 2201(a). The “actual controversy” required by the Declaratory Judgment

9 Act is the same as the “case or controversy” requirement of Article III. Societe de

10 Conditionnement en Aluminum v. Hunter Eng’g Co., 655 F.2d 938, 942 (9th Cir. 1981)

11 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-240 (1937)). “Issuing a

12 judgment in a case without an actual controversy is an advisory opinion, which is

13 prohibited by Article III of the United States Constitution.” Duhn Oil Tool, Inc. v.

14 Cooper Cameron Corp., 2007 WL 3335008, at *3 (E.D. Cal. Nov. 9, 2007). “[T]he facts

15 alleged, under all the circumstances, [must] show that there is a substantial controversy,

16 between parties having adverse legal interests, of sufficient immediacy and reality to

17 warrant the issuance of a declaratory judgment.” Maryland Casualty Co. v. Pacific Coal

18 & Oil Co., 312 U.S. 270, 273 (1941). “If a case is not ripe for review, then there is no case

19 or controversy.” Principal Life Ins., Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005).

20 In this case, there is no actual case or controversy between the parties. Consequently,

21 the Court cannot enter a declaratory judgment.

22 OPA provides that in an action to recover removal costs under OPA, “the Court

23 shall enter a declaratory judgment on liability for removal costs or damages that will be

24 binding on any subsequent action or actions to recover further removal costs or

25 damages.” 33 U.S.C. § 2717(f)(2). However, this provision is predicated upon an action

26 being filed to recover OPA removal costs, which cannot occur until the claims

27 presentation requirements of 33 U.S.C. § 2713 have been followed. As set out above, the

28

1 United States has not complied with these requirements. Therefore, it cannot seek a
2 declaratory judgment under 33 U.S.C. § 2712(f)(2).

3 **VIII. THIS COURT LACKS JURISDICTION TO DECIDE WHETHER THE**
4 **DEFENDANTS ARE ENTITLED TO LIMIT THEIR OPA LIABILITY**

5 Although not expressly set out in its Complaint, the Department of Justice has
6 advised that it wants to litigate Defendants' entitlement to limit their OPA liability
7 under 33 U.S.C. § 2704. If the Court has subject matter jurisdiction over this issue,
8 then a decree by the Court that the Defendants are entitled to limit their OPA liability
9 would bind the United States, and require the NPFC to reimburse Defendants any funds
10 expended in response to the Cosco Busan incident above the limitation amount. This
11 could result in a liability against the Oil Spill Liability Trust Fund in the amount of tens
12 of millions of dollars.

13 This Court has no jurisdiction over the limitation issue. The United States has
14 not waived its sovereign immunity with respect to such claims. Moreover, the doctrine
15 of exhaustion of administrative remedies requires that the limitation issue first be
16 presented for determination by the NPFC. If a shipowner is aggrieved by a decision of
17 the NPFC, it may seek review of that decision under the Administrative Procedures Act.
18 5 U.S.C. §§ 701, *et seq.* Finally, the doctrine of primary jurisdiction weighs in favor of
19 the Court deferring to the expertise of the NPFC with respect to the limitation issue.

1 **A. The United States Has Not Waived Sovereign Immunity Under OPA**
 2 **’90**

3 The United States may not be sued unless federal legislation specifically
 4 authorizes the suit. Hercules, Inc. v. United States, 516 U.S. 417, 422 (1996);
 5 Blackburn v. United States, 100 F.3d 1426, 1429 (9th Cir. 1996). Only Congress can
 6 consent to suits against the United States, the Executive is powerless to waive the
 7 federal government’s sovereign immunity. E. CHEMERINSKY, FEDERAL JURISDICTION,
 8 §9.2.1 (3d ed.1999). “A waiver of sovereign immunity ‘cannot be implied but must be
 9 unequivocally expressed.’” United States v. Mitchell, 445 U.S. 535, 537–38 (1980)
 10 (citations omitted). “Any waiver of sovereign immunity is to be construed narrowly, with
 11 ambiguities resolved in favor of the government. The natural consequence of the
 12 sovereign immunity principle is that the absence of consent by the United States is a
 13 fundamental defect that deprives the district court of subject matter jurisdiction.”
 14 14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed.
 15 1998) (citing cases).

16 OPA ’90 does not include a waiver of the United States’ sovereign immunity. See
 17 Int’l Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097, at 1102 (S.D.
 18 Tex. 1994) (finding even if Responsible Party could assert jurisdiction under 33 U.S.C.
 19 § 2717(b), sovereign immunity precluded the court’s review of Responsible Party’s claims
 20 for limitation of liability). “Nothing in OPA [33 U.S.C. §§ 2712, 2713, or 2715] can be
 21 construed as a waiver of sovereign immunity These sections do not create, nor can
 22 this court imply, a right to sue the [OSLTF] directly.” Id. at 1102.

23 Consistent with the Int’l Marine Carriers decision, the Department of Justice has
 24 maintained in other cases that a district court lacks jurisdiction to decide whether a
 25 shipowner is entitled to limit its liability under OPA. For example, in Unocal v. United
 26 States, a buried Unocal crude oil pipeline was breached during construction of a rail line,
 27 resulting in an oil discharge. After paying to clean up the costs of the pipeline, Unocal
 28 sought reimbursement of its costs from the NPFC. When the NPFC denied the claim,

1 Unocal sued the United States in the United States District Court for the District of
2 Central California. The United States moved to dismiss Unocal's claims, on the grounds
3 that the Court lacked subject matter jurisdiction to order the NPFC to reimburse
4 Unocal. The Court ruled for the United States. Copies of the United States motion
5 papers and the Court's order in the Unocal case are attached as Exhibits C-D to the
6 Walsh Declaration filed concurrently with the Motion.

7 OPA does not say that a responsible party can sue in federal court to obtain a
8 decree establishing its right to seek reimbursement from the OSLTF. Instead, it says
9 that if a responsible party pays more than its OPA limitation amount, it can present a
10 claim for reimbursement to the NPFC. 33 U.S.C. §§ 2708 & 2713(b). If the NPFC denies
11 the claim, the responsible party can seek review under the APA. See International
12 Marine Carriers, 903 F.Supp. at 1102; Gatlin Oil Co. v. United States, 169 F.3d 207 (4th
13 Cir. 1999); Water Quality Insurance Syndicate v. United States, 522 F.Supp.2d 220
14 (D.D.C. 2007); Apex Oil Co. v. United States, 208 F.Supp.2d 642, 2002 A.M.C. 493 (E.D.
15 La 2002); Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, 311
16 F.Supp.2d 69 (D.D.C 2004).

17 The attempt by the United States to raise the limitation issue in this suit is
18 inconsistent with the plain language of OPA, with the position taken by the United
19 States in previous cases, and with the process followed by responsible parties and the
20 NPFC in the cases cited in the preceding paragraph. Defendants are aware of no legal
21 authority that suggests the Court has jurisdiction over the limitation issue. An order
22 declaring that the Defendants are entitled to limit their liability would be tantamount to
23 an order directing the NPFC to reimburse the Defendants for amounts expended above
24 the limitation amount. Congress, in OPA, directed that such reimbursement claims be
25 presented to the NPFC, which administers the OSLTF. Consequently, this Court lacks
26 subject matter jurisdiction over the OPA limitation issues, and should dismiss the
27 Complaint to the extent it raises the limitation issue.
28

B. Defendants Have Not Exhausted Their Administrative Remedies Before The NPFC

This Court should not address the limitation issue because the Defendants have not yet exhausted their administrative remedies. OPA '90 and the NPFC's regulations require Defendants to first present their claims for limitation of liability under OPA '90 to the NPFC.

The doctrine of exhaustion of administrative remedies provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Moncrief v. United States, 43 Fed. Cl. 276, 284 (1999) (granting defendant's motion to dismiss because plaintiff failed to exhaust administrative remedy)(citations omitted). "Exhaustion is required to serve the purposes of protecting administrative agency authority and promoting judicial efficiency." Id. (citations omitted). The Supreme Court of the United States has stated:

[t]he agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.

Moncrief, 43 Fed. Cl. at 284 (citing McKart v. United States, 395 U.S. 185, 193 (1969). "An agency's effectiveness may also be weakened if people are encouraged to ignore its procedures by the allowance of 'frequent and deliberate flouting of the administrative process.'" Moncrief, 43 Fed. Cl. at 284 (citing McKart, 395 U.S. at 195). While failure to exhaust administrative remedies does not deprive a federal court of jurisdiction when an exhaustion statute is "merely a codification of the exhaustion requirement . . .," federal courts should still require compliance with an exhaustion statute unless the suit alleges a constitutional claim. McBride Cotton and Cattle Corp. v. Veneman, 290 F.3d 973, 978-980 (9th Cir. 2002).

1 The only avenue available to a Responsible Party seeking reimbursement from the
 2 OSLTF for costs in excess of its liability limitation under OPA '90 is to present a claim to
 3 the NPFC. 33 U.S.C. § 2708. OPA conveys no right for either the Responsible Party or
 4 the United States to raise the limitation issue in federal court in the first instance.
 5 Instead, OPA '90 provides that a Responsible Party who is entitled to a limitation of
 6 liability under 33 U.S.C. § 2404, "may assert a claim for removal costs and damages
 7 under [33 U.S.C. § 2713]." See 33 U.S.C. §§ 2708(2) & 2713(b)(1)(B). At 33 C.F.R.
 8 §§ 136.1 through 136.313, the NPFC has promulgated regulations governing the
 9 "[p]resentation, filing, processing, settlement, and *adjudication* of claims authorized to
 10 be presented to the [OSLTF]." 33 C.F.R. § 136.1(a)(1) (emphasis added). The NPFC
 11 routinely determines claims by responsible parties for reimbursement of amounts
 12 expended in excess of their OPA limits on liability. See e.g. In re Kuroshima Shipping
 13 Act of God and Limitation of Liability Analysis, 2003 AMC 1681 (Nat'l Pollution Funds
 14 Center 2003). If a Responsible Party's claim for reimbursement is denied by the NPFC,
 15 the Responsible Party can seek judicial review of the NPFC's decision under the
 16 Administrative Procedure Act. See e.g., Water Quality Insurance Syndicate v. United
 17 States, 522 F.Supp.2d 220 (D.D.C. 2007).

18 Under this statutory and regulatory scheme, it is clear that Defendants must first
 19 present their claims for reimbursement to the NPFC, and exhaust their remedies with
 20 that agency, before seeking judicial review. The NPFC, as a branch of the United
 21 States Coast Guard, has the necessary expertise to adjudicate responsible parties' claims
 22 for reimbursement from the OSLTF for costs in excess of their liability limitation under
 23 OPA. With regard to such claims, there are several issues that the NPFC is better
 24 suited to resolve than a district court. For example, in order for a Responsible Party to
 25 establish a right to limit its liability under OPA, the NPFC must determine whether the
 26 incident causing the discharge was the result of the violation of Coast Guard
 27 regulations, gross negligence, or willful misconduct. See 33 § U.S.C. 2704(c). It must
 28 also determine whether the actions taken by the Responsible Party were necessary to

1 prevent, minimize, or mitigate the effects of an oil spill, that removal costs were incurred
2 as a result of these actions, that the Responsible Party provided reasonable cooperation
3 and assistance in a removal, and that the actions taken were consistent with the
4 National Contingency Plan or directed by the Federal On-Scene Coordinator. See 33
5 C.F.R. § 136.203.

6 Consequently, the NPFC should be given the first opportunity to hear any and all
7 of Defendants claims for reimbursement from the OSLTF for costs in excess of their
8 liability limitation under OPA '90.

9 **C. Alternatively, This Court Should Abstain From Addressing The**
10 **Limitation Issue Under The Primary Jurisdiction Doctrine**

11 Under the doctrine of primary jurisdiction, "courts may, under appropriate
12 circumstances, determine that the initial decision making responsibility should be
13 performed by the relevant agency rather than the courts." Syntek Semiconductor Co.
14 Ltd. v. Microchip Tech, Inc., 307 F.3d 775, 780–81 (9th Cir. 2002). Although primary
15 jurisdiction does not implicate the federal courts' subject matter jurisdiction, it "is
16 properly invoked when a claim, even though cognizable in federal court, requires
17 resolution of an issue of first impression or of a complicated issue committed to a
18 regulatory agency by Congress." Id. at 780–81 (citations omitted). Primary jurisdiction
19 "is committed to sound discretion of the court when 'protection of the integrity of a
20 regulatory scheme dictates preliminary resort to the agency which administers the
21 scheme.'" Id. at 781 (citations omitted). A court's invocation of the primary jurisdiction
22 doctrine does not deprive it of jurisdiction- rather it imposes a stay on the litigation or
23 dismisses the litigation without prejudice. See Id. at 782.

24 A court may properly invoke primary jurisdiction in suits initiated by the United
25 States. In Far East Conference v. United States, the United States filed suit in a district
26 court to enjoin what it alleged to be defendant's violations of the SHERMAN ANTITRUST
27 ACT. 342 U.S. 570, 571 (1952). The defendant moved to dismiss the United States' suit
28 on the ground that the "nature of the issues require that resort must first be had to the

1 Federal Maritime Board before a District Court could adjudicate the Government's
 2 complaint." Id. at 572. In concluding the Federal Maritime Board should hear the
 3 issues before the District Court, the Court observed:

4 . . . [I]n cases raising issues of fact not within the conventional
 5 experience of judges or cases requiring the exercise of
 6 administrative discretion, agencies created by Congress for
 7 regulating the subject matter should not be passed over. . . .
 8 Uniformity and consistency in the regulation of business
 9 entrusted to a particular agency are secured, and the limited
 10 functions of review by the judiciary are more rationally
 11 exercised, by preliminary resort for ascertaining and
 interpreting the circumstances underlying legal issues to
 agencies that are better equipped than courts by
 specialization, by insight gained through experience, and by
 more flexible procedure.

12 Id. at 574-75.

13 Factors traditionally considered by courts in determining whether to invoke
 14 primary jurisdiction include: "(1) the need to resolve an issue that (2) has been placed by
 15 Congress within the jurisdiction of an administrative body having regulatory authority
 16 (3) pursuant to a statute that subjects an industry or activity to a comprehensive
 17 regulatory authority that (4) requires expertise or uniformity in administration."
 18 Syntek, 307 F.3d at 781 (citations omitted).

19 Pursuant to the doctrine of primary jurisdiction, this Court should dismiss
 20 without prejudice or stay the United States' action against Defendants. First, resolving
 21 limitations of liability under OPA and administering claims for reimbursement from the
 22 OSLTF are complicated issues which have been placed within the NPFC's jurisdiction by
 23 Congress. Second, the NPFC has jurisdiction over these issues pursuant to OPA and its
 24 own regulations- a statutory and regulatory scheme that subjects the activity of oil spill
 25 response to comprehensive regulation. See 33 C.F.R. §§ 2701-2762; see also 33 C.F.R.
 26 §§ 136.1-136.313. Finally, as noted above, these issues require the NPFC's expertise
 27 and uniformity in administration. See 33 C.F.R. § 136(a)(1). Therefore, even if the
 28 Court determines that the United States' action against Defendants is within its

1 jurisdiction, it should still dismiss without prejudice or stay the action since all of the
2 factors supporting this Court's invoking the primary jurisdiction of the NPFC are
3 present.
4

5 **IX. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that the Court dismiss
7 the United States OPA and non-OPA claims, or stay them until an actual controversy
8 within the Court's jurisdiction arises.
9

10 DATED: March 21, 2008

/s/ John Giffin

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